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JUN 13 1973

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5026

CLOVIS PATTERSON,

Appellant,

—v.—

SEWARD WARREN, ETC., ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW MEXICO

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5830

CLOVER PATTERSON,

Appellant,

—v.—

GEORGE WARNER, ETC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

Civil Action No. 69-232 CH

CLOVER PATTERSON, Individually and on behalf of all other persons similarly situated

v.

GEORGE WARNER, Individually and in this official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation

DOCKET ENTRIES

1969		
Nov.	7	Order granting leave to file without prepayment of costs
	7	Filed Complaint
	7	Issued summons and 6 copies (Ret. 20 days)
	7	Filed Petition to proceed wtihout prepayment of costs
	7	Filed affidavit in forma pauperis
Nov.	14	Filed Marshal's return on summons (served on Governor of W. Va., Atty. General of W. Va. & Warner, J. P.
	14	Filed Marshal's return on summons (served on State Auditor)
Dec.	1	Filed Notice of Motion, with motion attached for summary judgment, by counsel for defendant George Warner, Justice of Peace
	1	Filed Notice of Motion, with motion attached for stay and/or continuance, by counsel for defendant George Warner, Justice of Peace
	1	Filed Answer of defendant, Graham Motor Company, a corporation

DOCKET ENTRIES

1969

Dec. 11 Filed Plaintiffs' Application for convening of a three judge court

11 Filed Notice of Motion, certificate of service, and Motion for Stay of Execution of Judgment attached

11 Received brief in opposition to defendants motions for summary judgment and for a continuance or a stay

Dec. 30 Order deferring defendant's motions for summary judgment and for continuance and/or stay until convening of a three-judge court; plaintiffs' motion for temporary restraining order granted as to plaintiff, Clover Patterson only; defendant, George Warner, Justice of Peace, etc., is hereby enjoined from issuing execution of process pursuant to judgment against plaintiff in civil suit of Graham Motor Company v. Patterson, decided 10/23/69, until such time as case is decided on the merits; and further ordered that a three-judge court be convened

1970

Jan. 2 Order of Chief Judge of Fourth Judicial Circuit designating Honorable Herbert S. Boreman and Honorable Sidney L. Christie to serve with John A. Field, Jr. in determination of this action

2 Filed request of Honorable John A. Field, Jr. for designation of a three-judge court

Mar. 10 Order filing defendant, George Warner's answer and defendant's motions for summary judgment and for continuance and/or stay to be considered by court in its final decision

10 Filed Answer of defendant George Warner, individually and in his official capacity as Justice of Peace, with certificate of service

Nov. 24 Received plaintiff's memorandum in support of request for declaratory and injunctive relief

DOCKET ENTRIES

1970		
Dec.	17	Received memorandum in support of plaintiff's request for declaratory and injunctive relief
Dec.	31	Received Defendant's Memorandum in support of motion for summary judgment etc.
1971		
July	27	Filed plaintiffs' motion for consolidation for joint hearing, with certificate of service attached (with CA 71-85)
Aug.	5	Received Supplemental Memorandum in Support of Plaintiff's Request for Declaratory and Injunctive Relief
Aug.	20	Filed defendant's memorandum in opposition to plaintiff's supplemental memorandum in support of request for declaratory and injunctive relief
Dec.	16	Order, amending original designation of three judge court and designating John A. Field, Jr., U. S. Circuit Judge, Sidney L. Christie, U. S. District Judge and Dennis R. Knapp, U. S. District Judge
1972		
Feb.	8	Filed Court Reporter's Shorthand notes of proceedings 12/15/69
July	3	Received Defendant's Supplemental Brief
Sept.	13	Filed Court's opinion dated 8/25/72
	13	Order, by 3 judge Court that Chapter 50, Article 15, Section 2 of W. Va. Code found to be constitutional; denying relief sought by pltf; case retired from docket of Court
Oct.	13	Filed plaintiff's Motion to Appeal in Forma Pauperis
	13	Filed plaintiff's Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis
	13	ORDER, Permitting pltf to file notice of appeal in forma pauperis
	13	Filed notice of appeal

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 69-232

CLOVER PATTERSON, Individually and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

ORDER GRANTING LEAVE TO FILE WITHOUT PREPAYMENT OF COSTS—Entered November 7, 1969

Upon consideration of the motion of counsel for plaintiffs and of the affidavit of said plaintiffs, and it appearing therefrom that said plaintiffs are unable to pay the costs of filing and proceeding with this action for declaratory judgment, temporary and permanent injunctive relief to prevent the above styled defendants from enforcing certain statutes and administrative regulations on the grounds that said statutes and regulations are unconstitutional, and it further appearing that plaintiffs believe that they are entitled to the relief they seek; it is this 7th day of November, 1969,

ORDERED:

(1) That the plaintiffs be, and they are hereby granted leave to file and to prosecute this action without prepayment of costs, and

(2) That the Clerk of this Court shall permit the filing of this action without assessment of costs, and

(3) That the Clerk of this Court, upon filing of the complaint in this action, shall forthwith issue a summons and a copy of the complaint as provided by plaintiffs to the marshal for service upon each of the defendants and

shall issue to said marshall a copy of the complaint to be delivered to the Attorney General of the State of West Virginia, without requiring the prepayment of costs; and

(4) That the United States Marshal by his deputy, shall, upon receipt of summons and complaint, serve said summons and complaint to each of the persons made defendant in this action and deliver to the Attorney General a copy of said complaint without requiring the prepayment of costs, and

(5) That the Clerk of this Court file all other motions, affidavits or other papers required by the Court or by the Federal Rules of Civil Procedure and direct the United States Marshal to serve such papers as are required to be served by the Federal Rules of Civil Procedure without prepayment of costs.

(6) That all copies of necessary papers for the above styled action be served upon the Governor of West Virginia as required by 28 U.S.C. Sec. 2284 (2).

/s/ John A. Field, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

C.A. 69-232

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated, PLAINTIFFS

v.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

I

COMPLAINT—Filed November 7, 1969

Plaintiffs allege as follows:

1. The jurisdiction and authority of this Court are invoked under Title 28 U.S.C. § 1343(3) and (4), 2201 and 2202 and Title 42 U.S.C. § 1981, 1983 and 1988, to obtain declaratory judgment and injunctive relief. Plaintiff contends that West Virginia Code § 50-15-2 is unconstitutional in that it denies access to an appeal from a judgment for monies owing on a contract to those financially unable to post a bond with surety, thus creating an invidious discrimination against the plaintiff and others similarly situated on the basis of wealth, in violation of the equal protection clause of the Fourteenth Amendment.

2. This is an action for declaratory judgment, and a preliminary and permanent injunction to enjoin the unconstitutional denials of appeal from judgments for monies owing on a contract solely on the ground that the appellant is financially unable to post a bond with surety pursuant to West Virginia Code § 50-15-2.

3. This is a proper action for the convening of a three judge court pursuant to Title 28 U.S.C. §§ 2281 and 2284 in that this action directly challenges the constitutionality of the enforcement, execution and operation of a state statute.

4. Plaintiff, Clover Patterson, is a citizen of the United States and a resident of West Dunbar, West Virginia. Mr. Patterson is a welfare recipient currently undergoing training under the Work Incentive Program.

5. Defendant, George Warner, is a Justice of the Peace of Kanawha County, West Virginia, with his place of business located in Charleston, West Virginia.

6. Defendant, Graham Motor Company, is a corporation chartered under the laws of the State of West Virginia and during the course of business sold an automobile to plaintiff at 2 Newhouse Drive, Charleston, West Virginia.

II

Statement of the Claim

1. On or about November 14, 1968, defendant Graham Motor Company and plaintiff entered into an agreement, hereinafter referred to as "agreement", whereby plaintiff was to purchase a used 1959 Dodge station wagon.

2. Pursuant to this agreement, the balance payable was evidenced by a negotiable promissory note, hereinafter referred to as the "note", executed by the plaintiff contemporaneous with the execution of the agreement.

3. Delivery of the automobile was made on November 14, 1968.

4. Following delivery, the above-mentioned automobile repeatedly and continuously was in need of repair, which repair the plaintiff requested continuously from defendant Graham Motor Company and which requests were continuously denied after the first time.

5. As a result, plaintiff repudiated the "agreement" and ceased payment, pursuant to West Virginia Code § 46-2-602.

6. Nevertheless, on October 23, 1969, plaintiff appeared before Justice of the Peace George Warner to answer an

action for monies owing on a contract instituted by Graham Motor Company.

7. Despite the defenses of breach of warranty, failure of consideration, fraud, rightful repudiation and several others, judgment was granted to Graham Motor Company in the amount of $300 plus costs.

8. An appeal from the judgment of Justice of the Peace George Warner was requested by the plaintiff. The surety bond was set at $600 by defendant Warner pursuant to West Virginia Code § 50-15-2 which section requires such bond as a condition to appeal. Plaintiff was denied any forma pauperis relief or waiver of the bond requirement because of his poverty, nor is any such relief available to plaintiff under West Virginia law.

9. Plaintiff cannot, nor will he be able to find the necessary $600 himself, nor the $36 required by the several bonding companies located in Charleston, West Virginia. In addition, plaintiff does not own, in fee simple, any real property.

10. As a result, plaintiff has had judgment entered against him in the amount of $300 plus costs.

11. The appeal which plaintiff requested is not for the purpose of delay or to obstruct the summary process proceeding but is supported by bona fide defenses. (See attorney's affidavit attached hereto.)

III

Causes of Action

1. West Virginia Code § 50-15-2 provides, in relevant part, a qualified right of appeal from a judgment from monies owing on a contract.

> The appeal shall not be granted by the justice unless, within ten days after the judgment is rendered . . . bond with good security, to be approved by the justice in a penalty double the amount of the judgment . . . is filed with him, with condition to the effect that the person proposing to appeal will perform and satisfy any judgment which may be rendered against him on such appeal . . .

2. The plaintiff herein constitutes a family of low income and he is unable to raise the necessary funds to obtain the aforesaid bond and the sole reason why plaintiff did not supply the bond was that he is indigent and in a state of poverty and was, and is, unable to raise the necessary funds.

3. West Virigina Code § 50-15-2 which denies the opportunity for an appeal to those financially unable to post a bond with surety constitutes an invidious discrimination against the plaintiff herein on the basis of wealth and, thus, violates the due process and equal protection clauses of the Fourteenth Amendment.

4. West Virginia Code § 50-15-2, which denies the opportunity for an appeal to those financially unable to post a bond with surety constitutes a violation of plaintiffs' First Amendment right to petition the government for redress of grievances.

WHEREFORE, the plaintiff requests:

1. That a three-judge district court be convened under 28 U.S.C. 2284 to hear this action.

2. That the defendant, George Warner, Justice of the Peace, or any other Justice of the Peace of the State of West Virginia, be enjoined both during the pendency of this action and permanently from issuing any execution upon the judgment of monies due upon a contract obtained by the defendant Graham Motor Company in the case of Graham Motor Company vs. Patterson, decided October 23, 1969, until such time as there is a final determination of the case on appeal.

3. That the defendant Graham Motor Company, its agents, servants, employees and attorneys, or any of them, be enjoined during the pendency of this action and permanently from seeking or obtaining by whatever means, an execution upon the judgment of monies due upon a contract rendered in their favor in the case of Graham Motor Company vs. Patterson, decided October 23, 1969, until such time as there is final determination of the case on appeal.

4. That the time for an appeal by plaintiff Mr. Patterson in the case of Graham Motor Company vs. Patterson, decided October 23, 1969, be tolled.

5. That a declaratory judgment be given, declaring that portions of West Virginia Code § 50-15-2 relating to posting of a surety bond upon appeal is unconstitutional on its face and as applied to plaintiff herein.

6. That plaintiff be granted such other relief as may be appropriate.

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated

By Counsel

/s/ John L. Boettner, Jr.
Legal Aid Society of Charleston
1026 Quarrier Street
Charleston, West Virginia
Counsel for Plaintiffs

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, To-Wit:

CLOVER PATTERSON, the plaintiff named in the foregoing Complaint, after being first duly sworn, says that the facts and allegations therein contained are true, except insofar as they are therein stated to be on information, and that insofar as they are therein stated to be on information, he believes them to be true.

/s/ Clover Patterson
CLOVER PATTERSON

Taken, sworn to and subscribed before me this 7th day of November, 1969.

My commission expires June 29, 1975.

/s/ Greta S. Hicks
Notary Public

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated, PLAINTIFFS

v.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

AFFIDAVIT

My name is Clover Patterson and I am 34 years old. I am the father of 5 children ages 15, 13, 3, 2 and 9 months. I am a welfare recipient currently enrolled in the W.I.N. program. My address is P. O. Box 155, West Dunbar, West Virginia.

On November 14, 1968, I bought a used Dodge station wagon from Graham Motor Company. I signed a note to pay it off. I was told that the car was in good condition, but from the day I bought it, it kept on breaking down. I asked Graham Motor Company to fix it, but they refused after the first time. I was willing, and offered to return the car if I could get my money back, but Graham Motor Company refused.

I received a summons on or about the 1st day of October, 1969 to come to Justice of the Peace George Warner's court to answer a suit for nonpayment of the note since March.

On October 23, 1969, I went to see the J. P. He told me and Mr. Charles Lorber, a Legal Aid representative, that a contract was a contract and that was that. Mr. Lorber and I tried to explain to him that the car was no

good, and Mr. Lorber made some other arguments to him but he still said I owed $300 to Graham. After the hearing, Mr. Lorber said that I should appeal the case and to speak to Mr. Boettner, a Legal Aid lawyer about it. Mr. Boettner told me I had some good defenses. He said that the J. P. required a $600 Bond to appeal the case.

I told him I could not find that kind of money since I was on welfare. If I couldn't find it, I couldn't appeal or do anything else.

/s/ Clover Patterson
CLOVER PATTERSON

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, To-Wit:

I, Constance Ann Harper, a Notary Public in and for the County and State aforesaid, do hereby certify that CLOVER PATTERSON, whose name is signed to the foregoing Affidavit has this day acknowledged the same before me in my said County.

Given under my hand this 5th day of November, 1969.
My commission expires May 21, 1972.

/s/ Constance Ann Harper
Notary Public

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

AFFIDAVIT

My name is John Boettner, Jr., a Staff Attorney at Charleston Legal Aid Society, 1026 Quarrier Street, Charleston, West Virginia. I am a member of the West Virginia State Bar. I believe Clover Patterson have several valid defenses among which are failure of consideration and fraud.

/s/ John Boettner, Jr.
JOHN BOETTNER, JR.

Taken, sworn to and subscribed before me this 6th day of November, 1969.
My commission expires December 1, 1976.

/s/ Olga Williams
Notary Public

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 69-232

[Filed Nov. 7, 1969, Clerk's Office, U. S. Dist. Court, So. Dist. W. Va., Virgil F. Frizzell, Clerk]

CLOVER PATTERSON, Individually and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

GEORGE WARNER, Individually and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

AFFIDAVIT IN FORMA PAUPERIS

Clover Patterson, being first duly sworn on oath depose and say that he is a citizen of the United States; that he is the person named as plaintiff in the above entitled cause of action wherein the above named persons are the parties defendant; that they have personal knowledge of the facts herein stated.

That he is wholly without funds to pay the costs of the filing of this suit or to give security for the same; that he is unemployed and has no earnings of any kind; that he has no property either real or personal, from which he might obtain the necessary funds; that said suit is for temporary and permanent injunctive relief to enjoin the above styled defendants from executing judgment on plaintiff and for a declaration that said plaintiff may proceed with his appeal in the case of Graham Motor Company vs. Patterson informa pauperis rather than being required to post a bond as per West Virginia Code, 50-15-2.

/s/ Clover Patterson
CLOVER PATTERSON

Taken, sworn to and subscribed before me this 5 day of November, 1969.

My commission expires December 1, 1976.

/s/ Olga Williams
Notary Public

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

Civil Action File No. CH 69-232

[Filed, Dec. 1, 1967, Clerk's Office, U. S. Dist. Court, So. Dist., W. Va., Virgil F. Frizzell, Clerk]

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

NOTICE OF MOTION

TO: John L. Boettner, Jr.
Charleston Legal Aid Society
1026 Quarrier Street
Charleston, West Virginia

Graham Motor Company
2 Newhouse Drive
Charleston, West Virginia

Your are hereby notified that the undersigned defendant, George Warner, Justice of the Peace of Kanawha County, Louden District, West Virginia, through his counsel, Cletus B. Hanley, Deputy Attorney General, and James G. Anderson, Assistant Attorney General, will present his motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in his favor upon all in Civil Action File No. CH 69-232.

You are further notified that counsel for defendant, George Warner, Justice of the Peace of Kanawha County, Louden District, West Virginia, will present said motion on the 15th day of December, 1969, at ten-thirty o'clock a.m., E.S.T., or as soon thereafter as counsel can be heard which will be convenient for the Court.

GEORGE WARNER, Justice of the Peace of Kanawha County, Louden District, West Virginia,

By Counsel

/s/ Cletus B. Hanley
CLETUS B. HANLEY
Deputy Attorney General
Office of the Attorney General
Charleston, West Virginia

/s/ James G. Anderson
JAMES G. ANDERSON
Assistant Attorney General
Office of the Attorney General
Charleston, West Virginia

Counsel for Defendant

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

Civil Action File No. CH 69-232

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

MOTION FOR SUMMARY JUDGMENT

Defendant moves the Court as follows:

That it enter pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in defendant's favor against the plaintiffs for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law in that Chapter 50, Article 15, Section 2, of the West Virginia Code of 1931, as amended, is not in violation of the plaintiffs' rights under the First and Fourteenth Amendment of the United States Constitution.

This motion filed this 28th day of November, 1969.

GEORGE WARNER, Justice of the Peace of Kanawha County, Louden District, West Virginia
By Counsel

/s/ Cletus B. Hanley
Deputy Attorney General

/s/ James G. Anderson
Assistant Attorney General
Counsel for Defendant

[Certificate of Service (Omitted in Printing)]

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

Civil Action File No. CH 69-232

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

NOTICE OF MOTION—Filed December 1, 1969

TO: John L. Boettner, Jr.
Charleston Legal Aid Society
1026 Quarrier Street
Charleston, West Virginia

Graham Motor Company
2 Newhouse Drive
Charleston, West Virginia

You are hereby notified that the undersigned defendant, George Warner, Justice of the Peace of Kanawha County, Louden District, West Virginia, through his counsel, Cletus B. Hanley, Deputy Attorney General, and James G. Anderson, Assistant Attorney General, will present his motion for stay and/or continuance in Civil Action No. CH 69-232.

You are further notified that counsel for defendant, George Warner, Justice of the Peace of Kanawha County, Louden District, West Virginia, will present said motion

on the 15th day of December, 1969, at ten-thirty o'clock a.m., E.S.T., or as soon thereafter as counsel can be heard which will be convenient for the Court.

GEORGE WARNER, Justice of the Peace of Kanawha County, Louden District, West Virginia

By Counsel

/s/ Cletus B. Hanley
Deputy Attorney General
Office of the Attorney General
Charleston, West Virginia

/s/ James G. Anderson
Assistant Attorney General
Office of the Attorney General
Charleston, West Virginia
Counsel for Defendant

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

Civil Action File No. CH 69-232

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

MOTION FOR STAY AND/OR CONTINUANCE—
Filed December 1, 1969

Two cases have been docketed in the United States Supreme Court where it is highly probable that jurisdiction will be noted as a matter of right. *Boddie* v. *Connecticut* (DC Conn.). Dkt. 265. Leave to proceed in forma pauperis granted, probable jurisdiction noted, and case placed on summary calendar, June 23, 1969. *Frederick* v. *Schwartz* (DC Conn.). Dkt. 365 (Misc.). Jurisdictional statement filed as an appeal in forma pauperis, June 25, 1969. 2 Poverty Law Reporter, 10,011 and 10,012.

Defendant, therefore, moves this Court at its discretion to abstain from making its findings in this case until the United States Supreme Court has ruled on this issue.

Defendant recognizes that the doctrine of abstention does not apply strictly to this action since these particular plaintiffs have not instituted a similar action in another federal court.

However, it is felt that the situation existing between this case and those before the United States Supreme Court are analogous basically to the facts and issue and, therefore, defendant moves this Court to stay or continue this matter at its discretion in order to await the outcome of those cases which are now pending before the United States Supreme Court.

This motion filed this 28th day of November, 1969.

GEORGE WARNER, Justice of the Peace of Kanawha County, Louden District, West Virginia

By Counsel

/s/ Cletus B. Hanley
Deputy Attorney General

/s/ James G. Anderson
Assistant Attorney General
Counsel for Defendant

[Certificate of Service (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

Civil Action No. CH 69-232

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

ANSWER OF GRAHAM MOTOR COMPANY—
Filed December 1, 1969

1. Defendant, Graham Motor Company, neither admits nor denies the allegations contained in Paragraph One of plaintiffs' complaint as such are legal determinations to be made by the proper authority.

2. This defendant denies that there has been any unconstitutional denial of appeal.

3. Defendant denies the allegations contained in Paragraph Three of plaintiffs' complaint.

4. On information and belief, defendant admits that the plaintiff, Clover Patterson, is a citizen and resident of West Dunbar, West Virginia. Defendant is without knowledge or information regarding the other allegations contained in Paragraph Four of Plaintiffs' complaint.

5. Defendant, Graham Motor Company, admits the allegations contained in Paragraphs Five and Six of plaintiffs' complaint.

II.

Answer of Graham Motor Company to Statement of the Claim

1. Defendant, Graham Motor Company, admits the allegations contained in Paragraphs One, Two and Three.
2. This defendant denies the allegations contained in Paragraphs Four and Five.
3. Defendant admits the allegations contained in Paragraph Six.
4. Defendant admits that judgment was granted to Graham Motor Company in the amount of $300.00 plus costs but denies the other allegations contained in Paragraph Seven.
5. Defendant is without information and knowledge sufficient to form a belief as to the truth of the averments contained in Paragraphs Eight and Nine.
6. Defendant admits the allegations contained in Paragraphs Ten and Eleven.

III.

Answer of Graham Motor Company to Causes of Action

1. Defendant, Graham Motor Company, admits the allegations contained in Paragraph One.
2. Defendant, Graham Motor Company, is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph Two.

3. Defendant denies the allegations contained in Paragraph Three and Fou·

WHEREFORE, defendant, Graham Motor Company, requests that this action be dismissed and that he be awarded his reasonable costs incurred herein.

GRAHAM MOTOR COMPANY,
a Corporation

By Counsel

/s/ Dean Lewis
Counsel for Graham Motor
1500 Kanawha Boulevard, East
Charleston, West Virginia 25311

[Certificate of Service (Omitted in Printing)]

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

Civil Action No. CH 69-232

CLOVER PATTERSON, Individually, and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

GEORGE WARNER, Individually, and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia; and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

MOTION FOR STAY OF EXECUTION OF JUDGMENT

The plaintiff prays that the defendant, George Warner, Justice of the Peace, and any other Justice of the Peace of the State of West Virginia, be enjoined both during the pendency of this action and permanently from issuing any execution upon the judgment of monies due upon a contract obtained by the defendant, Graham Motor Company in the case of Graham Motor Company vs. Patterson, decided October 23, 1969, until such time as there is a final determination of the case on appeal.

I, John L. Boettner, Jr., counsel for plaintiffs, do hereby certify that a true copy of the foregoing Motion was served upon the counsel for Defendants by depositing

said copy in the United States Mail, first class postage prepaid, addressed as follows:

Dean Lewis, Esquire
1500 Kanawha Boulevard, East
Charleston, West Virginia 25311

Cletus B. Hanley, Esquire
Deputy Attorney General
Office of the Attorney General
Charleston, West Virginia

James G. Anderson, Esquire
Assistant Attorney General
Office of the Attorney General
Charleston, West Virginia

DATED: Dec. 11, 1969

/s/ John L. Boettner, Jr.

[Certificate of Service (Omitted in Printing)]

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. CH 69-232

CLOVER PATTERSON, Individually and on behalf of all other persons similarly situated, PLAINTIFFS

v.

GEORGE WARNER, Individually and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia, and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

ORDER—March 10, 1970

On the 10th day of March, 1970, came the defendant, George Warner, by his attorney James G. Anderson III, Assistant Attorney General, pursuant to the request of the court and asked that his answer be filed by court order pursuant to an order entered in this matter dated December 30, 1969, wherein his motions for summary judgment and for a continuance and/or stay were deferred for consideration by the convening of a three-judge court. Furthermore, the defendant requests that the filing of this answer will not render his motions as moot but asks that the court rule on them as this answer is being filed pursuant to the court's request.

Accordingly, it is ORDERED that the answer is hereby filed pursuant to the court's request, and it is further ORDERED that defendant's motions for summary judgment and for continuance and/or stay are hereby to be considered by the court in its final decision.

ENTER:

/s/ John A. Field, Jr.
District Judge

DATE:

Prepared by:

JAMES G. ANDERSON III
Assistant Attorney General
Counsel for Defendant

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. CH 69-232

[Filed Mar. 10, 1970, Clerk's Office, U. S. Dist. Court, So. Dist. of W. Va., James A. McWhorter, Clerk]

CLOVER PATTERSON, Individually and on behalf of all other persons similarly situated, PLAINTIFFS

v.

GEORGE WARNER, Individually and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia, and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

ANSWER OF GEORGE WARNER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY OF JUSTICE OF THE PEACE OF KANAWHA COUNTY, LOUDEN DISTRICT, WEST VIRGINIA

The defendant, George Warner, individually and in his official capacity, for answer to the complaint heretofore filed, states as follows:

"I

"COMPLAINT"

The defendant, for answer to that portion of the complaint referred to as "I Complaint", answers as follows:

I

The defendant denies the allegations contained in paragraph 1 of the complaint and states that Chapter 50, Article 15, Section 2 of the West Virginia Code of 1931, as amended, is constitutional and does not create discrimination for the reasons that the Constitution of the United States, particularly the Fourteenth Amendment thereto, does not guarantee as a part of the Equal Pro-

tection and Due Process Clause anything more than to be heard by a court in a civil action.

II

The defendant denies the allegations contained in paragraph 2 of the complaint.

III

The defendant denies the allegations contained in paragraph 3 of the complaint.

IV

The defendant states that he is without sufficient information to answer the allegations in paragraph 4 of the complaint, but for the purposes of this suit admits the allegations.

V

The defendant admits the allegations contained in paragraph 5 of the complaint.

VI

The defendant admits the allegations contained in paragraph 6 of the complaint.

"II

"STATEMENT OF THE CLAIM"

The defendant, for answer to that portion of the complaint referred to as "II Statement of the Claim", answer as follows:

I

The defendant admits the allegations contained in paragraph 1 of Statement of the Claim.

II

The defendant admits the allegations contained in paragraph 2 of the Statement of the Claim.

III

The defendant admits the allegations contained in paragraph 3 of the Statement of the Claim.

IV

The defendant states that he is without sufficient information to answer the allegations of paragraph 4 of the Statement of the Claim, but for the purposes of this suit admits the allegations.

V

The defendant states that he is without sufficient information to answer the allegations of paragraph 5 of the Statement of the Claim, but for the purposes of this suit admits the allegations.

VI

The defendant admits the allegations contained in paragraph 6 of the Statement of the Claim.

VII

The defendant admits the allegations contained in paragraph 7 of the Statement of the Claim.

VIII

The defendant admits the allegations contained in paragraph 8 of the Statement of the Claim.

IX

The defendant states that he is without sufficient information to answer the allegations of paragraph 9 of the Statement of the Claim, but for the purposes of this suit admits the allegations.

X

The defendant admits the allegations contained in paragraph 10 of the Statement of the Claim.

XI

The defendant denies the allegations contained in paragraph 11 of the Statement of the Claim.

"III

"CAUSES OF ACTION"

The defendant, for answer to that portion of the complaint referred to as "III Causes of Action," states as follows:

I

The defendant admits the allegations contained in paragraph 1 of the Causes of Action.

II

The defendant states that he is without sufficient information to answer the allegations of paragraph 2 of the Causes of Action, but for the purposes of this suit admits the allegations.

III

The defendant denies the allegations contained in paragraph 3 of the Causes of Action.

IV

The defendant denies the allegations contained in paragraph 4 of the Causes of Action.

WHEREFORE, defendant requests that judgment be rendered in defendant's favor against the plaintiffs for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law in that Chapter 50, Article 15, Section 2 of the West Virginia Code of 1931, as amended, is not in violation of the plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution.

/s/ George Warner
Individually and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia

By Counsel

JAMES G. ANDERSON III
Assistant Attorney General
State Capitol
Charleston, West Virginia

Counsel for Defendant

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

George Warner, the defendant named in the foregoing answer, after being first duly sworn, says that he knows the contents thereof, and that the facts and allegations therein contained are true except insofar as they are stated to be on information, and that insofar as they are therein stated to be on information he believes them to be true.

/s/ George Warner
GEORGE WARNER

Taken, sworn to and subscribed before me this 10 day of March, 1970.

/s/ Corena Mae Melton
Commissioned as
Corena Mae Shiflett

My commission expires January 30, 1979.

[Certificate of Service (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

Civil Action No. 69-232 CH

[Filed Sep. 13, 1972, Clerk's Office, U. S. Dist. Court, So. Dist. of W. Va., James A. McWhorter, Clerk]

CLOVER PATTERSON, Individually and on behalf of all other persons similarly situated, PLAINTIFF

versus

GEORGE WARNER, Individually and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia, and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

THREE-JUDGE COURT

Argued July 3, 1972 Decided August 25, 1972

Before FIELD, Circuit Judge, and CHRISTIE and KNAPP, District Judges

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JOHN L. BOETTNER, JR., ESQ., J. DAVID CECIL and HERMAN CANADY, JR., Legal Aid Society of Charleston, for plaintiffs, and JAMES G. ANDERSON, III, Assistant Attorney General, for defendants.

KNAPP, District Judge:

On November 7, 1969, plaintiffs instituted the above styled civil class action challenging the constitutionality of Chapter 50, Article 15, Section 2, of the West Virginia

Code of 1931, as amended. The statute in question requires the posting of bond in a penalty double the amount of the judgment in order to perfect an appeal from a judgment rendered by a Justice of the Peace in a civil action. In addition, plaintiffs sought injunctive relief to prevent execution on a judgment entered by defendant, George Warner, Justice of the Peace, and against plaintiff, in a civil action on contract, and requested that the time to appeal from the judgment be tolled.

Relief was sought pursuant to 42 U.S.C. §§ 1983, 1981 and 1988 and jurisdiction was invoked under 28 U.S.C. § 1343(3) and (4). By order of this Court, entered December 30, 1969, the defendant, George Warner, Justice of the Peace, and all other justices of the peace of the State of West Virginia, were enjoined from issuing any execution on the judgment rendered against plaintiff, Clover Patterson, in the state civil suit of Graham Motor Company v. Clover Patterson, on October 23, 1969, until such time as the issues raised herein were resolved and determined. Motions for Summary Judgment and for a Stay of Continuance, filed by defendants, were deferred until the convening of a three-judge court to hear and resolve the matter.

Pursuant to 28 U.S.C. § 2284, a three-judge court was designated, and on July 3, 1972, convened to hear counsels' arguments on plaintiff's request for declaratory and injunctive relief and defendant's Motion for Summary Judgment. Set for hearing on the same date was the case of Coretta Bias v. Joe Gies, et al., Civil Action No. 70-20. This action raised the identical issue presented in the instant case. It was agreed that the decision rendered herein shall be dispositive of said Civil Action No. 70-20.

The factual allegations of the complaint were admitted in the answer and counsel for both parties agreed that no further supporting papers, depositions, affidavits, or testimony would be required, and that the matter could be submitted to the Court on the record.

The facts, which are undisputed, may be briefly summarized as follows:

In November, 1968, plaintiff purchased, under a deferred purchase money contract, a used 1959 Dodge station wagon from the defendant, Graham Motor Company, Charleston, West Virginia. The balance payable was evidenced by a negotiable promissory note. Subsequent to the delivery of the vehicle, the owner encountered numerous mechanical defects in same, and allegedly being unable to obtain satisfactory repairs from Graham Motor Company, plaintiff repudiated the agreement and ceased payment thereon. On October 23, 1969, the plaintiff appeared before Justice of the Peace, George Warner, to answer an action for money due on contract instituted by Graham Motor Company. Plaintiff, defendant therein, raised numerous defenses, including breach of warranty, fraud, and repudiation. However, judgment was awarded by said Justice of the Peace to Graham Motor Company against Clover Patterson in the amount of $300 plus costs.

An appeal from the foregoing judgment was demanded by the plaintiff. Surety bond in the penalty of $600 was set in accordance with the provisions of the West Virginia statute, Chapter 50, Article 15, Section 2. Plaintiff did not have available an individual surety or a $36 fee for a commercial bond. As a result of his inability to perfect the appeal, the judgment against plaintiff in the amount of $300 became final.

Plaintiff, Clover Patterson, was accorded a full trial on the merits of his case in the Justice of the Peace court. Having received a hearing with full opportunity to present every available defense, the Due Process Clause of the Fourteenth Amendment is satisfied. There is no requirement that the state provide appellate review. *Lindsey* v. *Normet*, 405 U.S. 56 (1972) and cases cited therein. However, appellate review of the judgment of a Justice of the Peace is made available by statute, and it is the bond provision of same that is under attack in this proceeding.

The specific statute, Chapter 50, Article 15, Section 2, which plaintiff seeks to have declared unconstitutional reads in part:

"50-15-2 Appeal Bond

> The appeal shall not be granted by the justice unless, within ten days after the judgment is rendered . . . bond with good security, to be approved by the justice, in a penalty double the amount of the judgment, is filed with him, with condition to the effect that the person proposing to appeal will perform and satisfy any judgment which may be rendered against him on such appeal . . ."

The West Virginia courts have consistently and clearly held that the above quoted statute makes the posting of a surety bond mandatory. No appeal will be granted unless a bond with good security is approved by the Justice of the Peace and filed with him. *Staats* v. *McCarthy*, 130 W. Va. 240, 43 S.E.2d 826 (1947).

Plaintiff argues that the surety bond requirement of the foregoing statute results in arbitrary and invidious discrimination among individuals on the basis of wealth in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and his right to petition the government for a redress of grievances as guaranteed by the First Amendment. Defendant contends that the posting of the bond is a protection to which the person receiving judgment is entitled and further, that it serves to discourage frivolous litigation.

Presented by the facts herein are these questions: (1) Is the right to appeal the lawful judgment of a court of competent jurisdiction in a civil action absolute and uninhibited, and (2) If such appeal is not a matter of right, then to what extent and in what particulars may it be restricted and regulated. Succinctly stated, does Equal Protection as contemplated by the Fourteenth Amendment to the Constitution forbid conditions precedent to an appeal that involve the financial ability of the judgment debtor and create a de facto classification of citizens—the rich and the poor.

The idea of equality before the law for rich and poor alike is one of the oldest and most fundamental aims of our legal system. However, under the common law the

courts had no authority to permit a suitor to bring or carry on an action as a pauper. *LaBarbera* v. *Hart & Crouse Co.*, 248 App. Div. 261, 289 N.Y.S. 567, appeal dismissed, 272 N.Y. 534, 4 N.E.2d 435. Consequently, the right of a party to proceed in forma pauperis either in the trial court or on appeal has been governed wholly by statute. Annot., 11 A.L.R.2d. Forma Pauperis Suit-Non Party, p. 607, 608. Legislatures, except where inhibited by Constitutional mandate, have had the power generally to regulate appellate procedure, including the authority to require the giving of a bond as a condition precedent to the consummation of an appeal. 4A C.J.S. Appeal & Error, § 502, p. 208. In many jurisdictions, statutes have been passed requiring, as a condition precedent to taking or perfecting an appeal, that the appellant, or plaintiff in error, must give a bond, recognizance, or undertaking for payment of the judgment, order or decree. At least a substantial compliance with such statutes has been held essential to valid appeals or proceedings in error. *Brown* v. *S. H. Kress and Co.*, 207 N.C. 722, 178 S.E. 248; *Southern Ry. Co.* v. *Thomas*, 182 Va. 788, 30 S.E.2d 575. Moreover, statutes restricting the appellate process have been held not to violate constitutional provisions granting the right of appeal inasmuch as they are considered merely regulatory of the method for exercising the right. *Austin* v. *Oviedo*, 92 So.2d 648 (Fla.). In addition, poverty or inability to procure sureties has been found insufficient to relieve an appellant, or plaintiff in error, from the necessity of giving an appeal bond or other security absent statutory mandates. *Going's Administratrix* v. *Norfolk & Western Railway Co.* 11 Va. 543, 89 S.E. 914, aff'd 248 U.S. 538.

More recently, however, the constitutional guarantees of Due Process and Equal Protection have been held to require that appellate review in criminal cases, if made generally available, not be denied merely because of defendant's inability to pay the costs attendant upon the securing of such review. *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214; *Griffin* v. *Illinois*, 351 U.S. 12.

Although no court has yet clearly resolved the specific issue here involved, the Supreme Court has passed upon allied questions in some cases in this particular area of the law. These cases, hereinafter discussed, are *Griffin* v. *Illinois*, supra; *Boddie* v. *Connecticut*, 401 U.S. 371, and *Lindsey* v. *Normet*, supra. The latter named case is particularly pertinent to our discussion.

In *Griffin* v. *Illinois*, supra, plaintiff was convicted in a state court of armed robbery. In order to appeal a conviction in Illinois, the appellate court must be furnished with a bill of exceptions or report of the trial procedure certified by the trial judge. It is sometimes impossible to prepare such document without a stenographic transcript of the trial proceedings, which is furnished free only to indigent defendants sentenced to death. Plaintiff alleged that he was without funds to pay for a transcript and that the failure of the courts to provide it to him was a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Supreme Court held that plaintiff's constitutional rights were violated. Justice Black, speaking for the court, used this language:

> ". . . Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings, the Due Process and Equal Protections Clauses protect persons like petitioners from invidious discriminations."

It is clear from Justice Black's opinion, which studiously omits any reference to civil actions, that the Supreme Court limited the effect of its holding to criminal actions. Criminal actions, by their very nature, demand greater protections to safeguard defendants. Civil suits, however, are a vehicle by which people are given an opportunity to use a neutral government agency to adjust their differences. No deprivation of liberty is involved. Our Federal Constitution does not place civil disputes on the same plane as criminal. For this reason, this Court does not consider the Griffin case controlling on the issue herein raised. The Griffin case held simply that the Equal

Protection Clause imposes an affirmative duty on the government to lift the handicaps flowing from different economic circumstances in criminal cases.

In *Boddie* v. *Connecticut*, supra, the Supreme Court held that, in view of the basic position of the marriage relationship in society, and the state monopoly on the means for dissolving that relationship, Due Process prohibits a state from denying, solely because of inability to pay court fees and costs, access to its courts to indigents, who, in good faith seek judicial dissolution of their marriage. The Court, as indicated, bases its determination therein on the Due Process Clause of the Fourteenth Amendment; not the Equal Protection Clause.

It is to be further noted that the *Boddie* case is clearly distinguishable from the case at bar. In *Boddie*, without the payment of a fee, plaintiff was not given a meaningful opportunity to be heard, appropriate to the nature of the case. Here plaintiff was afforded an opportunity to be heard, and availed himself of that opportunity. He now argues that he has an absolute right to appeal without being hampered by financial requirements. Although the Court in *Boddie* cited the *Griffin* case, it emphasized that its decision went no further than to dispose of the particular case before it wherein the right to access to the courts "is the exclusive precondition to the adjustment of a fundamental human relationship—marriage." Again, it appears clear that the Supreme Court intended to limit the scope of its decision. A sales contract cannot be equated with a marriage contract. Sales contracts can be terminated without court action, marriages cannot. Nor can the initiation of a suit be equated with an appeal.

Moreover, as hereinbefore indicated, it is settled law that an appeal in forma pauperis is a privilege, not a right, and no requirement of Due Process is involved. *Dorsey* v. *Gill*, 147 F.2d 857 (N.D. Ind. 1945), cert. den. 325 U.S. 890, *Williams* v. *McCulley*, 131 F. Supp. 162 (D.C. La. 1955), and *Nichols* v. *McGee*, 169 F. Supp. 721 (N.D. Calif. 1959), appeal dismissed, 361 U.S. 6.

The case most closely in point with the issues raised herein is *Lindsey* v. *Normet*, supra. In *Lindsey* appellants, tenants of appellee, refused to pay their monthly

rent unless certain substandard conditions were remedied. Appellees threatened eviction. Appellants then filed a class action seeking to have the Oregon Forcible Entry and Wrongful Detainer statute declared unconstitutional. One of the provisions attacked in that action was the requirement of posting bond on appeal with two sureties in twice the amount of rent expected to accrue pending an appellate decision, the bond to be forfeited if the lower court decision is affirmed.[1] This requirement was in addition to the general appeal bond provisions of the Oregon law which are also a precondition to appeal and afford adequate protection to the landlord against loss pending the outcome of the appeal.[2] The Court, while

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[1] "105.160 Additional undertaking on appeal. If judgment is rendered against the defendant for the restitution of the real property described in the complaint, or any part thereof, no appeal shall be taken by the defendant from the judgment until he gives, in addition to the undertaking now required by law upon appeal, an undertaking to the adverse party, with two sureties, who shall justify in like manner as bail upon arrest, for the payment to the plaintiff if the judgment is affirmed on appeal of twice the rental value of the real property of which restitution is adjudged from the commencement of the action in which the judgment was rendered until final judgment in the action."

[2] "19.040 Form of undertaking on appeal; conditions for stay of proceedings; enforcement against sureties on dismissal of appeal. (1) The undertaking of the appellant shall be given with one or more sureties, to the effect that the appellant will pay all damages, costs and disbursements which may be awarded against him on the appeal; but such undertaking does not stay the proceedings unless the undertaking further provides to the effect following:

(a) If the judgment or decree appealed from is for the recovery of money, or of personal property or the value thereof, that if the same or any part thereof is affirmed, the appellant will satisfy it so far as affirmed.

(b) If the judgment or decree appealed from is for the recovery of the possession of real property, for a partition thereof, or the foreclosure of a lien thereon, that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that if such judgment or decree or any part thereof is affirmed, the appellant will pay the value of the use and occupation of such property, so far as affirmed, from the time of the appeal until the delivery of the possession thereof, not exceeding the sum

holding that the double bond pre-requisite for filing an appeal violated the Equal Protection Clause of the Fourteenth Amendment, used the following language:

> "While *a State may properly take steps to insure that an appellant post adequate security before an appeal* to preserve the property at issue, *to guard a damage award already made*, or to insure a landlord against loss of rent if the tenant remains in possession, the double bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damage sustained by the landlord." [Emphasis Supplied]

In *Lindsey*, it was not the purpose of the double bond requirement to protect the damage award, or the property to which an appellee might rightfully be entitled because of a lower court judgment. It was unrelated to the actual rent accrued or to the specific damage sustained by the landlord. Rather, the stakes were automatically doubled when a tenant sought to appeal an adverse decision. The end result of the application of the Oregon statute was to penalize an appellant who lost an appeal that may very well have been prosecuted in good faith. However, it should be noted that the Court in the very language used to strike down the special bond requirement of the Oregon statute under attack in *Lindsey*, inferentially approves the general Oregon bond statute which is substantially similar to that under attack in the case at bar.

The purpose of the bond provided by West Virginia law is to protect the person receiving the judgment in the Justice of the Peace Court; it is not penal in nature. The bond, given pursuant to the statute in question, is security which the statute substitutes for the advantage which plaintiff gains by his judgment. *Chewning* v. *Tomlinson*, 105 W. Va. 76, 141 S.E. 532. Its requirements are substantially the same as those of the general Oregon appeal bond statute, and serves the same purpose. While it is true that the general appeal bond statute of the State of Oregon was not under attack in *Lindsey*, and

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therein specified, to be ascertained and tried by the court or judge thereof. . ."

whether it was violative of the Equal Protection Clause of the Fourteenth Amendment was not directly in issue, yet the language of the Court above quoted is so clear and unequivocal there can be little doubt of the Court's views. It is also to be noted that Justices Douglas and Brennan who filed dissents did not take issue with the requirements, or the purpose of the general Oregon appeal bond statute.

As is urged herein, it is quite true that our legal system has recently undergone profound changes in keeping with today's special emphasis on individual rights, growing out of which has been the vindication of basic protections for the poor and the deprived among us. A person in that category may proceed in a criminal action in forma pauperis, and he may institute civil actions in forma pauperis. Responsible members of a democratic society are fully agreed that every citizen, without regard to his ability to pay or the possible frivolity of his alleged claim, is entitled to a fair and just adjudication of his grievance, whatever it may be, in accordance with the constitutional principles of Due Process and Equal Protection. In the instant case, however, there is no contention that palintiff was denied due process or other basic right during the course of litigation. He complains only that the bond prerequisite to appeal denies him Equal Protection of the Laws under the Fourteenth Amendment, and his right to petition his government for a redress of grievances under the First Amendment.

It is the Court's opinion that any First Amendment rights which may be indicated under the facts here are fully merged in, and circumscribed by, the Equal Protection of the Laws requirements of the Fourteenth Amendment. It is our further opinion that the concept of Equal Protection does not include full and unrestrained appellate review of an initial adjudication which afforded Due Process. Equal Protection, as a constitutional requirement, by its very nature, cannot be literally interpreted. It must be viewed and weighed in the light of certain basic factors inherent in the functioning of a workable and fair system of justice. Included therein are equality, uniformity, efficiency, and practicality. Con-

stitutional protections are not absolute. They must yield to accommodation when overriding interests of public policy are at stake. The Courts have consistently recognized that parties who prevail in the lower court are entitled to some protection of their property interests when the losing party decides to appeal. Justice Burton speaking for the Court in *National Union* v. *Arnold*, 348 U.S. 37, clearly expressed this premise in these words: "Where the effectiveness of a money judgment is jeopardized by the judgment debtor, he has no constitutional right to an appeal extending that frustration." Moreover, taxpayers who must shoulder a major portion of the costs of in forma pauperis proceedings are also entitled to consideration in placing reasonable restrictions and conditions on the appellate process.

Accordingly, we conclude that the provisions of Chapter 50, Article 15, Section 2, of the Code of West Virginia of 1931, as amended, required to be met as a prerequisite to perfecting an appeal from the final judgment of a Justice of the Peace in West Virginia is not violative of the Equal Protection of the Laws Clause of the Fourteenth Amendment of the Constitution of the United States, and is therefore constitutional and valid, and consequently, the relief sought herein by plaintiff is denied.

/s/ Dennis R. Knapp
U.S.D.J.

I concur.

/s/ Sidney L. Christie
U.S.D.J.

I concur.

/s/ John A. Field, Jr.
U.S.C.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

Civil Action No. 69-232 CH

[Entered Sep. 13, 1972, Civil Order Book, No. 31, Page 47]

CLOVER PATTERSON, Individually and on behalf of all other persons similarly situated, PLAINTIFF

versus

GEORGE WARNER, Individually and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia, and GRAHAM MOTOR COMPANY, a corporation, DEFENDANTS

ORDER

For the reasons set forth in the opinion of the Court dated August 25, 1972, and concurrently filed herewith, it is ADJUDGED and ORDERED as follows:

(1) Chapter 50, Article 15, Section 2 of the West Virginia Code is found and declared to be constitutional and valid.

(2) The relief sought by plaintiff herein is accordingly denied.

(3) Nothing further remaining to be done herein it is ORDERED that this case be retired from the docket of this Court.

The Clerk is directed to serve an attested copy of this order, with a copy of said opinion attached thereto, by United States Mail, upon each counsel of record.

ENTER:

/s/ John A. Field, Jr.
United States Circuit Judge

/s/ Sidney L. Christie
United States District Judge

/s/ Dennis R. Knapp
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. 72-5830

CLOVER PATTERSON, APPELLANT

v.

GEORGE WARNER, ETC., ET AL.

ON CONSIDERATION of the motion of the appellant for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

March 26, 1973

SUPREME COURT OF THE UNITED STATES

No. 72-5830

CLOVER PATTERSON, APPELLANT

v.

GEORGE WARNER, ETC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

March 26, 1973

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